No. 2661

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT

Bun Chew,
Appellant,

vs.

Charles T. Connell, as Immigration Inspector in Charge.
Appellee.

BRIEF OF APPELLEE

ALBERT SCHOONOVER,
United States Attorney.
CLYDE R. MOODY,
Assistant United States Attorney,
Attorneys for Appellee.

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The statement of facts at the beginning of the brief of appellant is substantially correct, but in order that a full understanding of the case submitted to the Secretary of Labor may be had it is necessary to consider the stipulation entered into by and between the attorney for the appellant and the attorneys for the appellee, which said stipulation is as follows:

> "IT IS HEREBY STIPULATED by and between Frank Stewart, attorney for the appellant in the above entitled cause, and Albert Schoonover, United States Attorney, and Clyde R. Moody, Assistant United States attorney, attorneys for the

appellee in the above entitled cause, that the transcript on file in said case, through an oversight, does not contain all of the record which was forwarded to the Secretary of Labor prior to the time of the issuance of the warrant on which the said alien Bun Chew was ordered deported.

"IT IS FURTHER STIPULATED that were all of the record which was so forwarded to the Secretary of Labor prior to the issuance of his order of deportation included within the said transcript, that it would appear that the statements of Beisaria Garcia and Guillermo Breton, set out on pages 45 and 46 of the transcript of record on appeal in this case were both read to the alien and attached to the application to the Secretary of Labor for a warrant of arrest and were made a part of the record by the Inspector in Charge of the examination of said alien, and that the alien Bun Chew himself identified the picture attached to the statements upon pages 10 and 11 of the said transcript as his photograph. The transcript on file, however, is a correct transcript of the record before the Court below on which judgment was entered, but it was not argued before the lower Court that the connection between petitioner and the person referred to in the statements of Garcia and Breton was not made.

FRANK STEWART,
Attorney for Appellant.
ALBERT SCHOONOVER,
United States Attorney.
CLYDE R. MOODY,
Assistant United States Attorney.
Attorney's for Appellee."

It will readily be seen that the stipulation answers several points contended for by counsel for appellant in his brief, but these matters will be more particularly called to the attention of the Court hereafter. We will take up the points put forward by counsel for appellant in the order in which he has argued them in his brief.

I.

(A) The first point counsel for appellant argues in his brief is that the alien Bun Chew was not given a fair hearing before the Immigration Department at Los Angeles. There can be no doubt about the necessity of a fair hearing, and in the event that the alien was not given a fear hearing, the proper procedure is by petition for writ of habeas corpus; but in this case we are firmly of the opinion that every right of the alien was safeguarded and that his hearing was fair in every particular. A writ of habeas corpus cannot be used as a writ of error, as has well been said in the case of Sibray vs. United States, 227 Fed. 1, and the jurisdiction under the writ is confined to an examination of the record with a view to determining whether the person restrained of his liberty is detained without authority of law. Therefore, all that is necessary for the appellee to show in this case is that the alien Bun Chew is held under legal authority and that he was given a fair hearing.

It is argued by counsel for appellant that the burden of proof is on the Department of Labor, the appellant being a Chinese laborer and being in possession of a genuine Chinese Laborer's Certificate of Residence,

which is prima facie evidence of his right to remain in the United States. It is admitted that Bun Chew had a Chinese Laborer's Certificate of Residence, and it is also admitted that the Government must in some way overcome the efficacy of such certificate of residence. The statements set out on pages 45 and 46 of the transcript show that the alien Bun Chew was in Mexico about the 1st day of April, 1912, and prior thereto, and the fact that he was arrested in the United States shows that he subsequently entered the United States, for he could not now be here without effecting an entry. Section 7 of the Act of 1888, being an amendment to the Chinese Exclusion Law, provides the manner in which a laborer in the United States, wishing to depart therefrom, may legally provide for his re-entry into the United States. In the case at bar the Secretary of Labor found that Bun Chew had been out of the United States, and being arrested within the United States the burden of proof then rested with the alien to show that his re-entry into the United States was legal. The alien strenuously denies that he was ever in Mexico (Tr. 15). It is logical to suppose that if his entry from Mexico, was legal he would not have denied his presence in Mexico, and it is prima facie evidence of his fraudulent entry into the United States when he is shown to have been in Mexico and he refuses to give any information about his entry into the United States. Counsel for appellant argues that the Government could easily have shown whether or not this man was duly admitted by an Immigrant Inspector.

This it was not incumbent upon the Government to do and would have been an almost impossible task in any event, as the records of every port of entry in the United States would have to have been presented in evidence at the hearing, and it was to obviate just such procedure as this that Congress made it incumbent upon a Chinese laborer in the United States to establish his right to be and remain here.

The stipulation recited above fully answers the contention of counsel for appellant on page 11 of his brief, that there was no connection established between the photograph marked "Bun Chew" on the back thereof, mentioned in the certificates on pages 10 and 11 of the transcript, and the alien; therefore it is not necessary to argue this point.

The case cited on page 11 of the brief of counsel for appellant, to-wit, Liu Hop Fong v. United States, 209 U. S. 453, is not a parallel case with the one at bar, in that that was a case where a person of the exempt class wos landed in the United States, and his landing being prima facie evidence of his right to be in the United States, if he were to be deported it devolved upon the prosecution to prove that his landing was fraudulent; and no presumption arose against him in that he belonged to the exempt class, whereas in the present case the defendant does not belong to the exempt class, but belongs to the excluded class, to-wit, the laboring class; and when it is shown that he has departed from the United States and subsequently re-entered, it then becomes his duty to show that his entry was legal.

(B) Under this sub-division in the brief of counsel for appellant, counsel reiterates a portion of his argument under the preceding subdivision. The argument of counsel here simply begs the question. The alien can not be in a position to affirm that his last entry into the United States was lawful when he denies that he was out of the United States; and it now having been shown that he was out of the United States he cannot be heard to say that it devolves upon the Government to prove that he was not legally re-entered into the United States. As we have stated above, our position under Section 7 of the Act of 1888 is that the certificate of residence which this alien presented lost its efficacy when he was shown to have been in Mexico on or about the 1st day of April, 1912; and that then in order that his certificate of residence should avail him of his contended right he must show that his last entry into the United States was legal,—in other words, the burden is shifted from the appellee to the alien when the appellee shows that the alien was in Mexico on or about the 1st day of April, 1912.

(C) Under this sub-division counsel for appellant alleges that improper matter was used as grounds for deportation, in that the statements of Garcia and Breton (Tr. 45 and 46), as well as the statements of Dong Bow, Do Wye and Chun John (Tr. 48, 53) were made prior to the arrest of the alien and prior to his hearing. This question is discussed at length by this Court in the case of Choy Gum v. Backus, 223 Fed. 487 (493) in which the Court says:

"This kind of testimony, while not ordinarily competent for judicial inquiry in the sense of a trial in a court of justice, has nevertheless been resorted to before executive officers and boards of immigration inspectors for determining the right of aliens to remain in this country, and yet the aliens have been refused their liberty upon habeas corpus, where the inquiry appeared to be fair and impartial, and where the immigration officers had been guilty of no abuse of discretion reposed in them. Such a case was Healy v. Backus, 221 Fed. 358. In that case many affidavits were taken and admitted, both for and against the petitioner, and a very wide range of inquiry was indulged in by which information was gathered by means of letters and reports, and yet the court was of the view that the inquiry was fairly conducted toward the aliens whom Healy represented, and without abuse of discretion on the part of the immigration officers, and consequently refused to liberate them upon habeas corpus; there being pertinent testimony adduced from which the finding made could be reasonably inferred."

In the case at bar, by the stipulation above recited, it appears that the statements of Garcia and Breton were both read to the alien, and the statements of Dong Bow, Do Wye and Chun John appear in the record after the attorney for the alien was admitted to the hearing, and on page 18 of the transcript it appears that the complete record in the case, so far as it had at that time proceeded, was handed to the attorney for the alien, whereupon he requested a con-

tinuance for the purpose of producing witnesses, which continuance was granted him, and the testimony of witnesses produced on behalf of the alien follows on page 19 et seq of the transcript. No advantage was taken of the alien, and he was given every opportunity to examine all the statements presented in evidence, or upon which the Immigration Department relied, and which were presented to the Secretary of Labor, and upon which the Secretary based his warrant of deportation. This is an analagous situation to that discussed in Sibray v. United States, 227 Fed. 7, in which case the court came to the conclusion that the alien had a fair hearing. Counsel cites the case of Whitfield v. Hanges, 222 Fed. 745 (751); but a close reading of that case distinguishes it from the present case, in that in that case the aliens were refused the right to present witnesses to rebut the contents of the statements used against them, and also in that case the statements forwarded to the Secretary of Labor were not introduced in evidence, but in this case not only are the statements a part of the record but those that appeared in the record before counsel was retained by the alien were translated and explained to the alien, as appears by the stipulation above recited. In the case of McDonald v. Siu Tak Sam, 225 Fed. 710, cited by counsel for appellant, it was held that the alien was not given a fear hearing in that the statements used against him were not shown to hi mand he was not cognizant of the contents, consequently had no opportunity to meet the allegations therein contained. Furthermore, that case is decided

on the facts and it was decided that there was no evidence against the alien to warrant his deportation, even if the statements were admitted against him. The contention of counsel for appellant, at the bottom of page 15 of his brief, is covered by the stipulation hereinabove cited, and it appearing that the statements were brought to the attention of the alien directly, and that they were handed his counsel and his counsel given opportunity to examine them and to produce evidence to refute them, the Secretary's power to act upon them and to issue his warrant of deportation cannot be questioned. That the testimony was pertinent goes without saying, in that it was direct proof, if accepted, that the alien had been in Mexico on or about the 1st day of April, 1912. The complaint of counsel that the statements on pages 45 and 46 of the transcript were unverified is without weight, in that an immigration officer is not authorized to administer an oath under the conditions that those statements were taken.

Whitfield v. Hanges, 222 Fed. 749, 750;
Act of Feb. 20, 1907, p. 1124, Par. 24, 34 Stat. 906;
McDonald v. Siu Tak Sam, 225 Fed. 713;

and a reading of the rule cited by counsel on page 19 of his brief, together with the decisions in the cases of Choy Gum v. Backus, 223 Fed. 492, and Healy v. Backus, 221 Fed. 358, abundantly discloses that evidence used by the Immigration Inspector in his warrant hearing does not necessarily have to be in the form of affidavits, but may be even letters.

The criterion of a fair hearing by an Immigration Inspector is (1) did the alien have an opportunity to meet all of the evidence used against him, and (2) was there any evidence upon which the warrant for deportation might rest; and from the above discussion it appears that both of these questions must be answered in the affirmative.

II.

(A) On page 20 et seq of the brief of counsel for appellant he contends that the Secretary has no jurisdiction to cause the deportation of appellant and has acted in excess of his jurisdiction in issuing the warrant of deportation, in that the alien was not actually deported within three years after landing or entry into the United States; whereupon he proceeds with some ingenuity to show that the warrant of deportation was actually dated more than three years from the entry of the alien into the United States from Mexico. The statement of Garcia, set out on page 45 of the transcript, states that he saw the Chinaman in Mexico, whose photograph marked Bun Chew was exhibited to him by Frank W. Heath, for a period of about two years, and until about three years ago. This establishes the fact that the alien Bun Chew was in Mexico. The statement of Breton, set out on pages 46 and 47 of the transcript, states that he saw the Chinaman in Mexico whose photograph was marked Bun Chew, and which photograph was shown him by Frank W. Heath, and that he frequented a Chinese restaurant at Agua Prieta. Now Breton states

that he is a citizen of Mexico, but has resided in Douglas, Arizona, continuously during the past 18 months, and that previous to his residence in Douglas, Arizona, he lived at Nacozari, Sonora, Mexico, for about seven years; at the conclusion of his statement he remarks that it has been about two years since he last saw this Chinaman. Taking his statement as a whole, therefore, it must be that the last time he saw the Chinaman was in Mexico, for he was in the United States for a period of only 18 months prior to his statement, all of the rest of the time being in Mexico, and if he saw the Chinaman two years before his statement it must have been in Mexico. Therefore, giving the statement of Breton the only logical interpretation that it can have, it means that he saw Bun Chew in Mexico about two years before his statement. His statement is dated the 30th day of March, 1914; therefore the time when he saw Bun Chew in Mexico would be about the 1st day of April, 1912, as set out in the warrant of deportation (Tr. 8). The warrant of arrest was dated May 22, 1914, and deportation ordered March 26, 1915. It will therefore be perceived that the warrant of arrest was dated almost an entire year prior to the time action against the alien Bun Chew under the Immigration laws would be barred by the statute of limitations, and the actual warrant of deportation was within the three years within which the Department of Immigration must act to remove aliens unlawfully within the country. Counsel cites the case of the International Mercantile Marine Co. vs. United States, 192 Fed. 887, and the

case of the United States vs. Oceanic Steam Navigation Co., 211 Fed. 967, to show that not only must the arrest of the alien be within three years from his entry into the country, but that his actual deportation must be effected before the expiration of three years from his entry. A glance at both of these cases will readily disclose that they are civil actions, and the findings of the court in these cases were to the effect that the steamship companies would not be obliged to pay for the expenses of deportation of aliens unless such deportation were actually effected within three years from the entry of the alien into the United States. However, we do not so interpret it, and we do not believe it to be the law, that the Immigration Department must not only cause the arrest of an alien, but his actual deportation within three years of his entry. The law under which the Immigration Department proceeds to deport aliens bears a close analogy to criminal laws under which a prosecution for a felony must be undertaken within three years from the date of the actual commission of the crime. In no case does a person have to be not only prosecuted, but actually convicted within three years of the commission of the crime; but it is sufficient if an action be commenced within three years and we are constrained to believe that that is the interpretation which Congress intended should be placed upon this law in question, namely, that a warrant of arrest must issue within three years from the date of entry of the alien into the United States, but that it is not necessary that his actual deportation

be effected within three years.

Judge Foster, in the case of United States vs. Redfern, 180 Fed. 506, holds as follows:

> "It is urged with great earnestness by counsel for relator that as it was physically impossible to deport him (the alien) from the United States within three years from the time he entered, when he was surrendered by his bondsmen, that he cannot be deported at all, as the law should be held to be that an alien must be both arrested and deported within three years. I cannot agree with this view. I consider the Government should have the whole of the last day of the three years in which to make the arrest, and, prescription being interrupted by the arrest, the Government is entitled to a reasonable time in which to carry out the sentence of deportation."

and the same view is entertained in 186 Fed. 669, where the court quotes from the above opinion.

III.

The last point contended for by counsel for appellant is that the Secretary exceeded his jurisdiction in ordering deportation to the country of nativity and not to that of his alleged last domicile. He argues that if the Secretary found that Bun Chew had been in Mexico he must necessarily have also found that he was a resident of Mexico, and being such resident of Mexico if he was to be ordered deported, should be ordered deported to Mexico as the country from whence he came. As he has said, the place to which deportation is to be made is governed by Sections

20, 21 and 35 of the Immigration Act of 1907, Section 35 reading "that the deportation of aliens arrested within the United States after entry and found to be illegally therein, provided for in this Act, shall be to the trans-Atlantic or trans-Pacific ports from which said aliens embarked for the United States; or, if such embarkation was for foreign contiguous territory, to the foreign port at which said aliens embarked for such territory."

Counsel recites that there is nowhere in the record any attempt to prove an embarkation from a foreign port to the United States through Mexico, and therefore it could not be held that there was any such embarkation for the United States through Mexico. The case of ex parte Gytl, 210 Fed. 918, cited by counsel, can hardly be relied upon as a ruling case, as in that case the aliens embarked from a foreign country for Canada and were peacefully engaged in laboring in the Dominion of Canada, when they were approached by an individual who offered them work, and to whom they hired themselves. This individual thereupon transported them to the United States without their knowledge and without their consent, where he placed them at work. The court found that they were in the United States without their consent and without their knowledge, and therefore ordered them deported to Canada, and quite right under the findings of the court.

In the case of United States vs. Redfern, 210 Fed. 548, the Court found that the Chinaman had been in the country more than three years and thus could not

be deported under the Immigration Act, and the court further found that "there was nothing to show that they came from Canada at all," and the statement quoted by counsel for appellant, "from the return itself, it is evident that the warrant is irregular, in that the Assistant Secretary of Labor found that the aliens entered the United States from Canada, yet they are ordered deported to China. This he was without authority to do," is nothing more or less than dictum, as the case was reversed upon another point; and furthermore, such a statement is directly contrary to the rule laid down by the Supreme Court in the case Frick vs. Lewis, 233 U. S. 91, in which case the Supreme Court held that a person having been a residence of this country for more than three years and going abroad for a temporary purpose and re-entering the United States unlawfully should be deported, not to the country from which he directly re-entered the United States, but to the country from which he originally came; in other words, to the trans-Atlantic port from which he first embarked. In the case at bar there is nothing to show that the sojourn of Bun Chew in Mexico was anything other than a temporary one, and that he intended to return to the United States when he went to Mexico, and his intention is best illustrated by the fact that he did re-enter the United States and is now seeking to establish his right to remain here. We have carefully examined the cases cited by counsel for appellant in his brief bearing on this point, and find none in which a party was deported to the country other than that

of his nativity, unless it affirmatively appeared that he was a subject or citizen of another country. In this case Bun Chew admits that he is a native of China and a subject of China. He sets up no claim to being subject to the laws of Mexico, but on the contrary says that he is a subject of China (Tr. 14), and in the absence of any affirmative proof on his part of his right to be deported to Mexico or his citienship in Mexico, the Secretary was right in finding that he should be deported to China. Of course we recognize the fact that this alien is being deported under the Immigration law, and not under the Chinese Exclusion law, but the procedure under the Chinese Exclusion law might throw some light on the procedure to be followed in this case, and under the Chinese Exclusion law it is incumbent upon the alien to affirmatively show his right to be deported to some country other than China. Sec. 2, Act of May 5, 1892, 27 Stat. 25.

The case of Lee Sim vs. United States, 218 Fed. 432, is in many respects a case similar to the one before us, and in that case the court held that the alien should not be deported to Canada, but should be returned to the country whence he came, to-wit, China. We do not believe that the appellant can now be heard to set up the claim that if he is to be deported at all, he should be deported to Mexico simply because the evidence shows he was in Mexico at one time.

Therefore, having fully answered all of the arguments advanced by counsel for appellant, and no rea-

son appearing why the order of the lower court refusing to discharge the alien upon the writ of habeas corpus should not be sustained, we respectfully submit that the order of the lower court should be affirmed.

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